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September 27, 1995

DOCKET FILE COPY ORIGINAL

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, NW
Washington, D.C. 20554

VIA: FACSIMILE AND
FEDERAL EXPRESS

RE: Implementation of Sections of Television Consumer Protection Act of 1992:
Rate Regulation, Sixth Report and Order and Eleventh Order on
Reconsideration / Small Cable Business Association Opposition to Motion for
Stay

Dear Mr. Caton:

Enclosed for filing are the original and 14 copies of the above-captioned document. We have also delivered a copy by fax. We have also enclosed a copy with a pre-addressed Federal Express envelope and request that a file-stamped copy be returned to us.

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Mr. William F. Caton

September 27, 1995

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The prompt dissemination of this information to the Commissioners and appropriate staff members is greatly appreciated.

If you have any questions or comments, please call us.

Very truly yours,

HOWARD & HOWARD



Christopher C. Cinnamon

Enclosures

cc w/enc:

(via Federal Express)

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(via certified mail)

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Avenue TV Cable Service, Inc.

Community Antenna Television, Inc.

National Cable Television Association

National Telephone Cooperative Association

U.S. Small Business Administration

Mr. James Eric Andrews, Deputy Attorney General

(via facsimile)

Small Cable Business Association

Eric E Breisach

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the matter of :

Implementation of Sections of :
Television Consumer Protection :
Act of 1992: Rate Regulation :

Sixth Report and Order and :
Eleventh Order on Reconsideration :

MM Docket Nos.: 92-266 ✓
& 93-215

DOCKET FILE COPY ORIGINAL

TO: The Commission

SMALL CABLE BUSINESS ASSOCIATION

OPPOSITION TO MOTION FOR STAY

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September 27, 1995

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the matter of

Implementation of Sections of
Television Consumer Protection
Act of 1992: Rate Regulation

Sixth Report and Order and
Eleventh Order on Reconsideration

MM Docket Nos.: 92-266
& 93-215

SMALL CABLE BUSINESS ASSOCIATION
OPPOSITION TO MOTION FOR STAY

I. INTRODUCTION

The Small Cable Business Association ("SCBA"), through counsel, respectfully submits this Opposition to the Motion for Stay ("Stay Request") filed by the New Jersey Board of Public Utilities ("NJBPU").¹ NJBPU seeks to stay critical provisions contained in paragraph 74 of the *Eleventh Recon Order*², provisions that provide long-awaited relief from administrative burdens for SCBA members, other small cable operators, small local franchise authorities ("LFAs"), and subscribers.

SCBA opposes the Stay Request for three principle reasons. First, the Stay Request fails to demonstrate adequate justification for stay under the standards applied by the Commission.

¹In conjunction with the Stay Request, NJBPU has also filed a Petition for Reconsideration ("NJBPU Petition"). SCBA opposes this Petition in a separate filing.

² *Sixth Report and Order and Eleventh Order on Reconsideration*, MM Docket Nos. 92-266 and 93-215, FCC 95-196, (released June 5, 1995) ("*Eleventh Recon Order*").

The Stay Request describes a speculative parade of horrors concerning the application of paragraph 74 to a single rate case. None of NJBPU's fears are probable. Moreover, all of the problems imagined by NJBPU are addressed under existing regulations. Second, the Stay Request attacks the fundamental rationale underlying the *Eleventh Recon Order*, the reduction of administrative burdens on cable operators *and* local franchise authorities ("LFAs"). Essentially, NJBPU argues that application of paragraph 74 to a single rate review matter will result in "irreparable harm" to subscribers. NJBPU asserts that because paragraph 74 simplifies the rate review process and reduces administrative burdens on cable operators and LFAs alike, NJBPU "will now have to commit additional resources in a proceeding to carry its burden" resulting in "unfair[ness] to subscribers and the Board". NJBPU's concerns are both speculative and illogical. Finally, SCBA believes that the rate case at issue has settled. Consequently, all NJBPU's arguments are moot.

The Stay Request fails to articulate any justifiable reasons for a stay of paragraph 74; therefore, SCBA requests denial of the Stay Request.

II. BACKGROUND

A. SCBA

SCBA and its members are keenly interested in NJBPU's Stay Request. SCBA formed in the wake of the 1992 Cable Act and *Rate Order*.³ SCBA serves as a self-help group for small operators faced with an unprecedented labyrinth of regulations. SCBA membership now exceeds 340 operators. Many SCBA members operate systems with less than 1,000 subscribers.

³ *Report and Order and Further Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 93-177, 8 FCC RCD 5631 (released May 3, 1993) ("*Rate Order*").

SCBA's principal missions have been to educate small operators and to work with the Commission to obtain relief for small cable businesses struggling under a regulatory structure that did not accommodate the unique circumstances of small cable.

Nearly all of SCBA's members benefitted from the long-awaited relief provided by *Eleventh Recon Order*. SCBA actively participated in the rulemaking process that led to the *Eleventh Recon Order*. As recognized repeatedly by the Commission, the administrative burdens and costs of cable rate regulation under the 1992 Cable Act have disproportionately affected small cable operators. Because NJBPU seeks regression to a regulatory regime from which SCBA has diligently sought relief, SCBA must oppose the Stay Request.

B. *Eleventh Recon Order* reflects the continuing efforts of the Commission to provide regulatory relief to small cable operators.

In evaluating the Stay Request, it is important to place paragraph 74 of *Eleventh Recon Order* in the context of continuing Commission efforts to address the concerns of small cable operators.⁴ NJBPU's Stay Request directly conflicts with the 1992 Cable Act and Commission action because it expressly seeks to *increase* burdens on small cable operators.

Small system relief began with *Rate Order*. In that Order, the Commission permitted small systems to simply certify to LFAs that basic service and equipment rates were reasonable.⁵ Small systems were also exempt from rate regulation for over six months while

⁴The 1992 Cable Act directs the Commission to reduce regulatory burdens and the cost of compliance for small systems. 47 U.S.C. §§ 543, 543(i).

⁵*Rate Order* at ¶ 462; 47 C.F.R. § 76.934(a).

the Commission considered additional proposals.⁶ This consideration resulted in additional small operator relief in *Second Recon Order*.⁷ *Second Recon Order* expanded the range of small operators entitled to relief and provided for transition relief from the 17% rate rollback.⁸

More small operator relief followed. *Fifth Recon Order* provided small operators a 60 day grace period following the onset of regulation to file rate justifications and to notify subscribers of new rates.⁹ Additionally, the Commission granted small operators 90 days from the initial date of regulation to restructure rates.¹⁰ Later, *Sixth Recon Order* provided small operators a means to recover the costs of headend equipment associated with adding channels and improving service.¹¹ The Commission also acted to relieve small operators from bearing a disproportionate burden of cable service regulatory fees by basing the fees on an exact subscriber count.¹² The Commission expressly directed all of these efforts at alleviating the

⁶*Memorandum Opinion and Order*, MM Docket No. 92-266, FCC 93-389, 8 FCC Rcd 5585 (1993).

⁷*Second Reconsideration, Fourth Report and Order and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) ("*Second Recon Order*").

⁸*Second Recon Order* at ¶¶ 117-122.

⁹*Fifth Order on Reconsideration and Further Notice of Proposed Rulemaking*, MM Dockets Nos. 93-215 and 93-266, 9 FCC Rcd 5327 (1994) at ¶ 7 ("*Fifth Recon Order*").

¹⁰*Id.*

¹¹*Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking*, MM Docket Nos. 92-266 and 93-215, FCC 94-286 (date) ("*Sixth Recon Order*") at ¶¶ 91-94.

¹²*Report and Order*, MD Docket No. 94-19, FCC 94-140, 9 FCC Rcd 533, 5368 (1994).

disproportionate burden of regulation on small cable operators. The 1992 Cable Act mandates this effort.

Small operator relief continued in *Eighth Recon Order*.¹³ In that order, the Commission permitted small systems and systems owned by small MSOs to negotiate alternative rate regulation agreements with certified LFAs.¹⁴ The Commission concluded that alternative rate regulation agreements provided an opportunity to achieve reasonable rates while reducing administrative burdens and costs for both small systems and LFAs. Soon after *Eight Recon Order*, the Commission permitted independent small systems that elected transition relief to recover inflation increases from September 30, 1992.¹⁵ Again, the Commission expressly provided this relief to alleviate financial burdens on small operators.¹⁶

This Commission action shows a consistent theme and increasing momentum toward reducing regulatory burdens on small cable. This has continued with *Eleventh Recon Order*, key provisions of which NJBPU seeks to block.

C. The *Eleventh Recon Order* addresses specific and demonstrated regulatory burdens.

The Commission expressly directed *Eleventh Recon Order* toward the complaints of small cable operators. "In crafting the relief we adopt today, we have attempted to alleviate both the

¹³*Eighth Order on Reconsideration*, MM Docket Nos. 92-266 and 93-215, FCC 94-42 (March 17, 1995) ("*Eighth Recon Order*").

¹⁴*Eighth Recon Order* at ¶¶ 25-27.

¹⁵*Ninth Order on Reconsideration*, MM Docket No. 92-266, FCC 95-43 (released February 6, 1995) ("*Ninth Recon Order*") at ¶¶ 11-15.

¹⁶*Ninth Recon Order* at ¶ 10.

substantive and the procedural burdens of which smaller cable companies complain."¹⁷ Specific burdens considered by the Commission include:

1. Rate regulation did not adequately take into account the higher costs of doing business for smaller cable companies.¹⁸
2. Rate regulation did not adequately take into account the higher cost of capital for smaller cable companies.¹⁹
3. Compliance with rate regulation imposed an inordinate hardship upon smaller cable companies in terms of labor and other resources. For example, preparation of a "streamlined" cost-of-service filing alone absorbed 60 hours.²⁰
4. Rate regulation imposed burdens on LFAs that must review cost-of-service filings. Many small LFAs exhausted scarce resources to review complicated cost-of-service filings.²¹
5. The need existed for the Commission to guard against burdensome and unnecessary data requests by LFAs.²²
6. The burdens identified by small cable companies include those imposed by ongoing rate reviews.²³

The record gave the Commission "little reason to question those commenters who contend that our existing rules significantly burdened small systems."²⁴ Consequently, the Commission

¹⁷*Eleventh Recon Order* at ¶ 55.

¹⁸*Id.*

¹⁹*Id.*

²⁰*Id.* at ¶¶ 55-56.

²¹*Id.* at ¶ 56.

²²*Id.* at ¶ 66.

²³*Id.* at ¶ 74.

²⁴*Id.*

calculated a presumptively reasonable rate for small cable companies of \$1.24/channel, so long as the operator can cost justify this rate. The Commission also fashioned a procedural framework for reviewing Form 1230 cost-of-service filings that aims to reduce administrative burdens on *all* participants in the process, operators, LFAs, the Commission and other interested parties. Finally, the Commission directed in paragraph 74 that LFAs permit qualifying small cable companies to justify rates in all pending rate reviews under the rules announced in the *Eleventh Recon Order*.

Now NJBPU seeks to stay paragraph 74. NJBPU's Stay Request and Petition run 180° against the Commission's continuing efforts to evaluate and respond to the unique circumstances of small cable. Moreover, NJBPU is an agency of a financially powerful state government, an agency that has made no claim in any rulemaking to date of inability to obtain resources to regulate basic cable and equipment rates. These factors should guide the Commission's analysis of NJBPU's move to block the Commission's carefully crafted and long-awaited relief for small cable companies and small LFAs nationwide.

III. NJBPU FAILS TO JUSTIFY ITS STAY REQUEST UNDER APPLICABLE COMMISSION STANDARDS.

NJBPU presents several arguments in an attempt to support its Stay Request. As discussed in this section, none of these arguments meets the Commission's threshold requirements for granting a stay.

A. Commission standards for evaluating stay requests.

The Commission evaluates requests for stay under familiar standards.²⁵

To support a stay, petitioners must demonstrate: (1) that they are likely to prevail on the merits; (2) that they will suffer irreparable harm if a stay is not granted; (3) that other interested parties will not be harmed if the stay is granted; and (4) that the public interest favors grant of a stay.²⁶

As discussed below, NJBPU's arguments fail to establish good cause for stay under these standards.

B. The Service Electric case.

NJBPU's principle argument for stay springs from a rate case involving Service Electric Cable TV of Hunterdon ("Service Electric") According to the Stay Request:

Application of the Commission's new definition of a small system to pending matters will allow at least one cable operator in New Jersey to have an unfair advantage with respect to the setting of rates, because the cable operator as of the effective date of the FCC's rules promulgated under the Commission's Order, will now be able to increase its rate for all channels from \$23.00 per month to a presumed reasonable charge of \$74.40 per month, or whatever lesser amount the cable operator calculates pursuant to the Commission's new Form 1230, unless the Board meets the burden of showing that the rate calculated is unreasonable.²⁷

NJBPU appears to argue that because it did not resolve the one isolated rate case by June 5, 1995, regulatory catastrophe will result absent a stay. Because Service Electric offers a large

²⁵*TCI Cablevision of St. Louis, Inc., Petition for Stay of Local Rate Order of City of St. Louis*, Order, 9 FCC Rcd 2141, DA 94-424 (released April 29, 1994) at ¶ 3, n. 2 citing *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 673-74 (D.C. Cir. 1985) (per curiam); *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 842-43 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921 (D.C. Cir. 1958); see also 47 C.F.R. § 1.429(k).

²⁶*Id.*

²⁷Stay Request at 1-2.

channel selection on basic, NJBPU raises the specter of an unfettered rate increase to \$74.40. SCBA recognizes that NJBPU is principally responsible for ensuring that basic cable rates in New Jersey remain at reasonable levels. Nonetheless, NJBPU's arguments that the *potential* application of the paragraph 74 to the Service Electric case are either entirely speculative or unfounded and fail to meet the standards for grant of stay.

The speculative nature of NJBPU's arguments is best demonstrated by one observation: the Service Electric case has settled. Based on conversations with officers of Service Electric, SCBA believes a settlement was reached within 7 days before this Opposition was filed. This fact moots the Stay Request and provides grounds for denial. Nonetheless, SCBA will respond thoroughly to the arguments raised in the Stay Request

C. The NJBPU Petition has failed to demonstrate likelihood on the merits.

Underlying the Stay Request is NJBPU's Petition for Reconsideration ("NJBPU Petition"). The NJBPU Petition seeks modification of paragraph 74 to remove its application to pending rate matters. With its Petition, NJBPU seeks to place before the Commission the facts of the Service Electric case and the hypothetical effect of paragraph 74 on that case. Under standards applied by the Commission to petitions for reconsideration, NJBPU has failed to present adequate justification for granting its petition and will not likely prevail on the merits.

47 C.F.R. § 1.429(b) establishes the standards for evaluating NJBPU's Petition. It states:

A petition for reconsideration which relies on facts which have not previously been presented to the Commission will be granted only under the following circumstances:

- (1) The facts relied on relate to events which have occurred or circumstances which have changed since the last opportunity to present them to the Commission;
- (2) The facts relied on were unknown to petitioner until after his last opportunity to present them to the Commission, and he could not through the exercise of ordinary diligence have learned of the facts in question prior to such opportunity; or
- (3) The Commission determines that consideration of the facts relied on is required in the public interest.

NJBPU's petition fails to present any new facts which meet these standards.

The NJBPU Petition seeks reconsideration based on the following five "facts":

1. The *Eleventh Recon Order* "may result in the retroactive redefinition of Service Electric as a 'small system' for the entire period during which its disputed rates have been in effect".²⁸
2. Service Electric and NJBPU Staff had reached a "tentative settlement", but, in response to the *Eleventh Recon Order*, Service Electric chose instead to justify rates with a Form 1230.²⁹
3. Because of the \$1.24/channel presumptively reasonable rate, Service Electric could now raise rates to \$74.40 per month.³⁰
4. Shifting the burden of proof to the LFA for rates up to \$1.24/channel will "necessitate the use of Board and State resources not usually required, through the presentation at hearing of expert testimony establishing why Form 1230 derives an unreasonable rate."³¹
5. The NJBPU's ability to determine Service Electric's "true costs" will be "severely restrained" and require the commitment of "additional resources".³²

²⁸NJBPU Petition at 4.

²⁹*Id.* at 5.

³⁰*Id.*

³¹*Id.* at 6.

³²*Id.*

SCBA responds to these assertions of "fact" in sequence.

1. Service Electric's status as a small cable company remains uncertain.

NJBPU asserts that Service Electric has sought to proceed under the new small cable company rules. As the NJBPU petition admits, Service Electric's status remains an unresolved question of fact. This does not constitute a fact not before the Commission justifying reconsideration. To the contrary, the Commission anticipated such questions and placed the burden of establishing small cable company status on the operator.³³ If Service Electric were to establish small cable company status, this would represent the result intended by the Commission, not a new "fact" warranting reconsideration.

2. Any effect of paragraph 74 on a "tentative settlement" is either speculative or intended by the Commission.

Any "tentative settlement" influenced by paragraph 74 is not a changed circumstance that warrants reconsideration. The Service Electric case commenced on July 14, 1994. The NJBPU had received ample notice that the Commission was considering redefining "small cable system" and providing additional relief to small operators.³⁴ The Commission sought comment on these proposed changes. NJBPU had ample opportunity to bring the facts of the Service Electric case to the Commission. It chose not to do so. Moreover, NJBPU took over a year to conduct the cost-of-service review, more than six months past the Commission's deadline for an LFA cost-of-service review. NJBPU was fully entitled to issue a rate order 180 days after July 14, 1994

³³*Eleventh Order on Recon* at ¶ 74.

³⁴*Second Recon Order*, 9 FCC Rcd at 4223; *Fifth Notice of Proposed Rulemaking*, 9 FCC Rcd at 4247.

based on the best information then available to it.³⁵ It did not. NJBPU's own scheduling choice is not a new "fact" to introduce into the rulemaking. Furthermore, the Commission was obviously aware that its order would effect pending rate cases at all stages. It directed this result in paragraph 74. Consequently, the Service Electric case does not present any new facts, changed circumstances or a result not expressly anticipated by the Commission.

3. The NJBPU fear of a \$74.40 rate for basic is entirely speculative.

The NJBPU Petition claims that Service Electric may attempt to justify a rate of \$74.40 for its 60 channel basic service. This has not occurred. Based on the NJBPU Petition, Service Electric was still attempting to justify a maximum permitted rate of \$26.31. Consequently, the specter of a \$75 basic rate is not realistic. Moreover, *Eleventh Order on Recon* fully reaffirms the requirement that Form 1230 rates must be cost based. Otherwise, such rates will be unreasonable. Small operators still remain fully subject to all remedies for unreasonable rates. Again, NJBPU's hypothetical rate scenario does not present any new facts.

4. Shifting the burden of proof to the LFA for rates up to \$1.24/channel will not "necessitate resources not usually required".

NJBPU argues that paragraph 74 will require it to expend additional resources to challenge a hypothetical rate from an imaginary Form 1230. Again, NJBPU presents a speculative fear, not a previously unrepresented fact. Upon closer scrutiny, it appears that NJBPU is already girding for the fight with New Jersey's small cable companies. Apparently, the NJBPU anticipates operators seeking unjustified rate increases. While the agency is certainly entitled to approach rate regulation with this bias, its bias is not grounds for reconsideration.

³⁵47 C.F.R. § 76.933(b).

5. The NJBPU's ability to ascertain Service Electric's true costs will now be simpler rather than being "severally restrained".

NJBPU argues that paragraph 74 will shackle its ability to determine Service Electric's "true costs." This is another speculative fear rather than a fact not previously presented to the Commission. Again, this is not grounds for reconsideration under 47 CFR 1.429(b).

Upon closer scrutiny, the argument seems even more puzzling. The Service Electric case is over 14 months old. The NJBPU has used that time to obtain at least as much information as it needed to reach a "tentative settlement".³⁶ It remains unclear what further information NJBPU will require to evaluate a Form 1230. While the NJBPU is certainly entitled to expend more or less resources in investigating any Form 1230 that Service Electric may file, under *Eleventh Recon Order*, it need not do so. The Commission expressly encourages LFAs to limit their information requests to ease administrative burdens on operators *and* LFAs.³⁷

6. The NJBPU Petition has failed to demonstrate grounds for reconsideration.

The NJBPU Petition fails to present facts or circumstances that have not been considered by the Commission. Moreover, as discussed below, the Stay Request and Petition fail to demonstrate any public interest justification for reconsideration of paragraph 74. Consequently, the Petition does not provide credible grounds for reconsideration under 47 C.F.R. § 1.429. As a result, the Stay Request is unlikely to prevail on the merits and there is no good cause for granting a stay.

³⁶SCBA believes the case has already settled.

³⁷*Eleventh Recon Order* at ¶ 65.

D. Denial of the Stay Request will not irreparably harm anyone.

The Stay Request asserts that paragraph 74 "will irreparably harm subscribers in New Jersey, Hunterdon County."³⁸ The Stay Request fails to demonstrate any credible reasons why paragraph 74 will harm Hunterdon County subscribers, or anyone else.

The Stay Request argues as follows:

Service Electric subscribers will suffer irreparable harm resulting from the virtual deregulation of the cable operators rates. . . If Service Electric is redefined as a small system pursuant to the Commission's Order, the Board will lose substantial control over the rates the operator will be allowed to charge.

. . .Should Service Electric seek the maximum amount deemed reasonable by the Commission under the Form 1230 process, multiplication of Service Electric's regulated 60 channels by the \$1.24 per-channel amount would result in an increase in its rate from \$23.00 per month to \$74.40 per month.³⁹

The alleged "irreparable harm" is more accurately described as "hypothetical harm." SCBA offers several reasons why the Stay Request fails on this point.

First, the linchpin of NJBPU's argument remains uncertain. Service Electric has not established its status as a small cable company. This remains a factual dispute in which Service Electric bears the burden of establishing that it meets small cable company limits. If the question is resolved against Service Electric, NJBPU's fears evaporate. Such a contingency contradicts any assertion of the likelihood of irreparable harm.⁴⁰

³⁸Stay Request at 2.

³⁹Stay Request at 5-6.

⁴⁰SCBA believes the Service Electric case has settled, rendering the entire argument moot.

Second, NJBPU's claim of "virtual deregulation" neglects critical provisions of the 1992 Cable Act and the Commission's regulations. Absent effective competition, Service Electric's basic and equipment rates remain fully subject to LFA and Commission regulation. These rates must remain at or below maximum permissive levels defined by the Commission as reasonable.⁴¹ Under *Eleventh Recon Order*, Service Electric, if it satisfies the small cable company standard, still must justify any rate in excess of benchmark with a cost-of-service filing.⁴² Rates justified by Form 1230 must remain cost based.⁴³

Read narrowly, NJBPU's argument appears to be this: The *Eleventh Recon Order* will visit irreparable harm on Hunterdon County because Service Electric may establish cable rates that permit it to recover costs and a reasonable profit. As politically attractive as low cable rates may be, the law mandates compensatory rates. The Commission directed the *Eleventh Recon Order* at that requirement because regulation unduly burdened small cable systems and threatened their economic viability. NJBPU argues for a regulatory scheme that neither the Commission, the 1992 Cable Act, nor the 5th Amendment permits.

Read more broadly, NJBPU's challenge is about political control. The Stay Request complains of an "unprecedented shift in burden of proof" requiring NJBPU to prove presumptively reasonable rates are unreasonable. The Stay Request further argues against the new limits on discovery that will make Service Electric's hypothetical Form 1230 "difficult if not impossible to challenge." To do so will "necessitate the use of Board and State resources

⁴¹43 U.S.C. § 543(b).

⁴²*Eleventh Recon Order* at ¶¶ 57-63.

⁴³*Id.* at ¶ 64.

not usually required, through the presentation at hearing of expert testimony." At bottom, this is a disagreement with the Commission about its assessment of the consequences of unbridled LFA control over the rate review process and procedure

The Commission restructured the rules for small operator cost-of-service to address concerns articulated by the industry. To reduce documented administrative burdens on small operators, the Commission chose to "guard against burdensome and unnecessary data requests" and limited LFA information demands.⁴⁴ Likewise, the Commission chose to simplify filing procedures and expedite the appeal process. The Commission structured these changes not only to ease burdens on small operators, but to provide relief for small LFAs.⁴⁵

The NJBPU does not like these changes. It will probably lose some leverage over small operators. But compared to small cable companies and many small cities, towns, and villages, NJBPU is big, well-staffed and well-funded. Based upon comments submitted to the Commission, it was just such entities that imposed the burdens on small cable operators that led to the complaints resulting in the *Eleventh Recon Order*. If the past predicts the future, the NJBPU will find ample resources to regulate basic cable and obtain the information it needs to ensure reasonable rates under Commission regulations. The new rules merely modulate such efforts.

Finally, the Stay Request implies that, absent a stay, rates in Hunterdon County will skyrocket and subscribers will suffer irreparably. NJBPU argues that with a stay, rates can be

⁴⁴*Id.* at ¶¶ 65-68.

⁴⁵*Id.* at ¶ 56.

adjusted after resolution of the NJBPU Petition and no harm will result. NJBPU has it backwards.

The *Eleventh Recon Order* continues to implement the 1992 Cable Act mandate of ensuring reasonable cable rates. If Service Electric charges rates that are later determined unreasonable, it is subject to refund liability.⁴⁶ Subscribers get their money back. Consequently, even under NJBPU's Hunterdon County nightmare, subscribers will have a remedy against unreasonable rates and not be irreparably harmed.

E. Grant of Stay will irreparably harm Service Electric.

If a stay is ordered, Service Electric must delay justifying or increasing rates under *Eleventh Recon Order*. If the NJBPU Petition is later denied, Service Electric cannot return to subscribers for a retroactive rate increase. The rate differential will be revenue forever foregone, in a phrase, irreparable financial harm. This is precisely the circumstance that the Commission has sought to remedy.⁴⁷ To avoid this harm, paragraph 74 has expressly directed LFAs to permit use of the *Eleventh Recon Order* to pending cases. Consequently, the Stay Request fails to demonstrate that Service Electric will not be harmed if the Stay were granted.

F. The Public Interest favors denial of the Stay Request.

The Commission articulated its analysis of the public interest in *Eleventh Recon Order*. The Commission has stated, and SCBA agrees, that the public interest is best served by a financially healthy small cable industry.

⁴⁶47 C.F.R. § 76.942.

⁴⁷*Eleventh Recon Order* at ¶ 55.

Our analysis of cost data, when combined with our understanding of the many unique challenges facing small cable companies, leads us to conclude that a simplified approach will best serve a segment of the cable industry that needs assistance in coping with rate regulation in order to serve subscribers better and grow its business. In addition, this approach should facilitate regulation of cable rates by small local franchising authorities who wish to have a procedure for doing so that is simpler than existing forms of regulation.⁴⁸

NJBPU disagrees with the Commission. It argues that the public is best served if Service Electric remains saddled with the administrative burdens that commenters described as "unduly burdensome" and an "inordinate hardship".⁴⁹ The NJBPU contends that the public interest is served if New Jersey does not have to expend "resources not usually required, through the presentation at hearing of expert testimony establishing why Form 1230 derives an unreasonable rate under the facts and circumstances involved."⁵⁰

This argument is a *non-sequitur*. The shift in the burden of proof under the *Eleventh Recon Order* does not mandate that LFA expend additional resources and invest in expert testimony. To the contrary, the new rules are expressly designed to *reduce* administrative burdens on small LFAs and cable operators. Concerning the Service Electric case, the NJBPU admits that it had conducted sufficient discovery to reach a tentative settlement. If it later contests a Form 1230 as unreasonable, it already possesses the necessary evidence to support a challenge. Moreover, the NJBPU cannot seriously contend that dire consequences to the

⁴⁸*Eleventh Recon Order* at ¶ 3.

⁴⁹*Id.* at ¶ 55. The Commission stated that the record gave it no reason to doubt these comments. *Id.* at ¶ 74.

⁵⁰Stay Request at 6.

public interest will result if it chooses to enlist rate regulation expertise in the Service Electric case. That remains the choice of the NJBPU, not a mandate of the *Eleventh Recon Order*.

The NJBPU public interest arguments have demonstrated only what the Commission intended: the *Eleventh Recon Order*, including paragraph 74, will reduce administrative burdens on small cable companies and small LFA's. The Stay Request has failed to articulate any credible balancing of interests that weighs in favor of a stay. Consequently, the Stay Request should be denied.

IV. CONCLUSION AND REQUESTED RELIEF.

The NJBPU seeks to stay paragraph 74 because of its hypothetical application to a single New Jersey rate case. The arguments presented in the Stay Request fail to meet any of the standards required for establishing good cause for staying paragraph 74. SCBA respectfully requests that the Commission deny the Stay Request.

Respectfully submitted,

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